administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." *United States v. Western Pac. R. Co.*, 352 U.S. 59, 64 (1956). *See also Far East Conference v. United States*, 342 U.S. 570 (1952); *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907); *Southern Pac. Transp. Co. v. San Antonio, Tex.*, 748 F.2d 266, 272 (5th Cir. 1984).

Courts have long used the doctrine of primary jurisdiction to refer matters to the FCC where the case involved a question of whether a practice by a regulated common carrier complied with FCC regulations and policies. See, e.g., *Carter v. AT&T*, 365 F.2d 486, 498 (5th Cir. 1966) , *cert. denied*, 385 U.S. 1008 (1967)(in antitrust case challenging carrier's tariff prohibiting attachments to its telephones, district court properly referred the issue of the lawfulness of the tariff under FCC policies). *See also Ambassador, Inc. v. United States*, 325 U.S. 317, 324 (1945) ("where the claim of unlawfulness of a [tariff] is grounded in lack of reasonableness, the objection must be addressed to the [FCC] and not as an original matter brought to the court").

Courts also have made primary jurisdiction referrals to the FCC to determine whether various state regulations conform to the Communications Act and with FCC orders. *See Alltel Tennessee v. Tennessee Public Service Commission*, 913 F.2d 305, 309-10 (6th Cir. 1990) (primary jurisdiction referral in case alleging that a ruling by the Tennessee PSC with respect to cost separations for federal and state ratemaking purposes violated an FCC order); *Air Transport Assoc. of America v. Public Utilities Commission of the State of California*, 833 F.2d 200, 206 n. 7 (9th Cir. 1987) , *cert. denied*, 487 U.S. 1236 (1988)(in case challenging a state PUC regulation under section 202(a) of the Communications Act,"the district court

properly retained jurisdiction over the claim, while sending the parties to the FCC to allow that agency to utilize its specialized, technical expertise to determine whether [the state regulation] would interfere with the development of a rapid and efficient nationwide telecommunications network").

In so doing, the courts have frequently noted the FCC's experience with technical and policy issues arising from competitive entry into telecommunications services. *See In re Long Distance Telecommunications Litigation*, 831 F.2d 627, 630-31 (6th Cir. 1987) (in upholding the referral of issues going to the reasonableness of certain practices by long distance companies, the Sixth Circuit noted the district court's reliance on "the pervasive nature of the FCC's regulatory authority over the communications industry and the agency's long involvement in the process by which . . . competitors of AT&T gained access to the long distance telephone market"); *Allnet v. National Exchange Carrier Assoc.*, 965 F.2d 1118, 1123 (D.C. Cir. 1992) (district court was correct in referring tariff reasonableness issue because "judicial resolution of [the] claims here would preempt the Commission from implementing what amounts to policy decisions about [Commission] programs and technical questions on the adequacy of filed tariffs").

The fact that Section 252(e)(6) of the 1996 Act authorizes this Court to review state PUC decisions approving interconnection agreements does not preclude primary jurisdiction referral of appropriate issues to the FCC in the course of such a review proceeding. In the 1996 Act, Congress intended that the FCC would be responsible for making technical and policy judgments in implementing the Act, and the statutory scheme requires this Court to review the state decision for conformity with Section 251 and the FCC's implementing

regulations. Accordingly, the Court must look to FCC regulations as providing the rules for decision in its review of the agreements approved by the state PUC.

A primary jurisdiction referral to the FCC is, therefore, appropriate in the exercise of this Court's judicial powers under Section 252(e)(6) when the case turns on a disputed interpretation of FCC regulations, or when there is doubt as to how the FCC regulations may apply to a particular factual situation. *See Allnet*, 965 F.2d at 1122 (concurrent grant of jurisdiction over complaints to district court and to FCC "does not prohibit the court from withholding decision until the Commission has spoken on technical or policy questions that would determine the outcome"); *Carter v. AT&T*, 365 F.2d at 498 (referral of lawfulness of carrier's tariff under Communications Act and FCC policy preliminary to trial court's consideration of action under the Sherman Act). A referral in such circumstances vindicates Congress' expressed desire for uniform national standards as well as the need for the "expert and specialized knowledge of the agencies involved . . . . " *United States v. Western Pac. R. Co.*, 352 U.S. at 64.

II. *PRIMARY JURISDICTION REFERRAL TO THE FCC IS APPROPRIATE HERE.*

A. The Number Portability Dispute.

SWB and AT&T apparently agree that it would be appropriate to refer the Number Portability Dispute to the FCC for initial resolution of the conflicting interpretations of the governing FCC regulations. The FCC's regulation states that local exchange carriers shall provide "transitional" number portability measures that "may consist of Remote Call Forwarding (RCF), Flexible Direct Inward Dialing (DID), or any other comparable and technically feasible method . . . . " 47 C.F.R. § 52.27 (a). SWB argues that this language

limits AT&T to the specified transitional mechanism of RCF and DID, whereas AT&T relies on the "comparable and technically feasible" language to argue that it is entitled to other mechanisms.

Interpretation and application of the FCC's number portability regulation is a predicate to any judicial review of this aspect of the interconnection agreement pursuant to Section 252(e)(6) of the Act. Primary jurisdiction referral here is particularly appropriate because it will place the construction and application of the FCC's number portability regulation in the hands of the expert agency explicitly designated in Section 251(b)(2) of the 1996 Act to implement the number portability requirement. *See Carter v. AT&T Co.*, 365 F.2d at 498-99 (primary jurisdiction appropriate where the FCC has "specialized competence" to construe communications tariff filings, and where the construction and application of a tariff are "a critical, if not decisive, issue" in the case).

B. The Intellectual Property Dispute.

Although SWB has not suggested primary jurisdiction referral of the Intellectual Property Dispute, AT&T has moved for referral to the FCC of that issue as well. The FCC agrees that the Intellectual Property issue is appropriate for such referral.

Underlying the Intellectual Property Dispute is the question whether AT&T or SWB should be responsible for negotiating amendments to SWB's third-party vendor agreements, to the extent that such amendments are necessary for SWB to provide certain unbundled network elements to AT&T. The "agreement" approved by the Texas Commission places the burden of obtaining such amendments on AT&T. AT&T asserts that SWB's statutory and regulatory obligation to provide AT&T with nondiscriminatory access to unbundled elements requires that

SWB obtain any necessary amendments from third-party vendors to provide AT&T with access that is equal to that of SWB itself, and that placing the burden of obtaining those amendments on AT&T would impair its ability to obtain those licenses on the same terms upon which SWB has obtained them. AT&T Consolidated Mem. at 13-14. In contrast, SWB argues that requiring AT&T to negotiate its own licenses with SWB's third-party vendors would place AT&T in exactly the same position as SWB and is inherently nondiscriminatory. SWB Motion to Dismiss Pursuant to Rules 12(b)(6) and 12(b)(1) at 6.

Resolution of these conflicting interpretations of SWB's nondiscrimination obligations under the 1996 Act and the FCC's regulations is a task in the first instance for the FCC. The FCC has not yet spoken definitively on the application of its nondiscrimination rules to the intellectual property issue. *See In re Implementation of Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd at 15710 (¶ 419). The application of the nondiscrimination rules to the specific facts here involves precisely the competing policy choices and economic issues that Congress entrusted in the first instance to the FCC in the 1996 Act.

Moreover, the issues raised by the Intellectual Property Dispute have already been raised in two proceedings now pending before the FCC. *See* Petition for Reconsideration and Clarification of the Local Exchange Carrier Coalition, at 26-27, filed Sept. 30, 1996 (assigned to CC Docket No. 96-98); Petition of MCI for Declaratory Ruling (filed March 11, 1997)(assigned to Dockets CCBPol 97-4 and CC Docket No. 96-98). The FCC's resolution of the issues in these pending administrative proceedings will directly affect the Intellectual Property Dispute here. The FCC submits that judicial and administrative efficiency, and well

as consistency, will be best served by suspending the judicial proceedings until after the FCC provides the Court with the results of these pending agency proceedings.

CONCLUSION

For the foregoing reasons, the FCC respectfully suggests that the Court stay the proceedings in this case and refer the issues identified above to the FCC.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing Motion of the Federal Communications Commission for Leave to Appear and Participate as *Amicus Curiae*, Brief of Federal Communications Commission as *Amicus Curiae* in Support of Primary Jurisdiction Referral, and proposed Order were served, by first class mail, postage prepaid, upon:

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this 21st day of March, 1997.

MARGARET H. PLANK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SOUTHWESTERN BELL TELEPHONE CO. *et al.* Plaintiff,	)	
v.	)	C.A. No. A-97CA-132-SS
AT&T COMMUNICATIONS OF THE SOUTHWEST, INC. *et al.* Defendant and consolidated cases	)	

ORDER

Upon consideration of the motion filed on behalf of the Federal Communications Commission for leave to appear and participate as amicus curiae in AT&T Communications of the Southwest v. Southwestern Bell Telephone Co., C.A. No. A-97CA-029-SS, one of the actions consolidated herein, and the Memorandum in Support thereof,

IT IS HEREBY ORDERED THAT the motion be and it is granted.

The United States Department of Justice may appear and file its memorandum on behalf of the Federal Communications Commission in that action.

_____

UNITED STATES DISTRICT JUDGE

Dated: _____

4:30 p

K Lowers
cc: Karen

Service Date: April 30, 1998

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF The Petition of AT&T Communications of the Mountain States, Inc. Pursuant to 47 U.S.C. Section 252(b) for Arbitration of Rates, Terms, and Conditions of Interconnection With U S WEST Communications, Inc.	))))))	UTILITY DIVISION DOCKET NO. D96.11.200 ORDER NO. 5961d

* * * * *

ORDER ON SUPPLEMENTAL DISPUTED ISSUES

TABLE OF CONTENTS

INTRODUCTION AND BACKGROUND

This proceeding began with a request on November 22, 1996 from AT&T Communications of the Mountain States, Inc. (AT&T) for the Montana Public Service Commission (Commission) to arbitrate pursuant to 47 U.S.C. § 252(b). AT&T had been unable to negotiate all the terms and conditions of interconnection with U S WEST Communications, Inc. (U S WEST) and requested Commission arbitration of the unresolved issues.

The Commission held an arbitration hearing from February 4 through February 14, 1997, and issued its Arbitration Order, Order No. 5961b, on March 20, 1997. Both AT&T and U S WEST petitioned for reconsideration of parts of the Commission's arbitrated decision. The Commission issued its Order on Reconsideration, Order No. 5961c, on July 9, 1997, directing the parties to file a single agreement incorporating the decisions from both orders within 45 days of service of the Order on Reconsideration.

On July 18, 1997, the United States Court of Appeals for the Eighth Circuit issued its decision in Iowa Utils. Bd., et al. v. FCC, 120 F.3rd 793 (8th Cir., 1997), *amended on reh'g*, 135 F.3d 535 (Oct. 14, 1997), *cert. granted, sub nom.* AT&T Corp. v. Iowa Utils. Bd., 118 S.Ct. 683 (1998). This order amending the Court's earlier opinion affected the Commission's decision. Despite the opinion, the parties filed a single agreement on September 4, 1997. However, the agreement was not executed and it included numerous provisions setting forth both sides of issues which arose following the Eighth Circuit's opinion. It also included other issues which arose between the parties from their negotiations following the Eighth Circuit opinion and the Commission's arbitrated decision.

The parties represented to the Commission with the September filing that the juxtaposed language in their unsigned agreement was their respective final proposed language on each remaining unresolved issue. The parties have requested the Commission to decide these issues before they execute their interconnection agreement. Some of these issues were thought to be resolved before the first order in this matter was issued by the Commission.

Shortly after the parties filed their agreement, AT&T asked the Commission for a meeting to present further information explaining many of the still-unresolved issues, stating that this had been done in other U S WEST states. The Commission directed its staff to meet informally with the parties' representatives. This meeting took place on September 25, 1997. Although the parties used this meeting to further explain numerous issues, any information that might be characterized as additional evidentiary information presented by the parties at that time is not used as support for any of the Commission findings in this Order.

The Eighth Circuit reconsidered and clarified its July 18, 1997 opinion in its Order on Petitions for Rehearing dated October 14, 1997. Notably, the Court vacated the Federal Communications Commission's (FCC) rule 51.315(b) which prohibited incumbent LECs from separating existing network element combinations. The parties requested the opportunity to file additional briefs to address the effect of the October 14 order on the network element combination issues still pending before the Commission.

The Commission's decisions are based upon the legal arguments made by the parties in their briefs, the applicable FCC orders and regulations, and upon the record as it existed as of the close of the arbitration hearing on February 14, 1996. The record includes no other evidentiary-type materials presented or available to the Commission subsequent to that hearing.

The Commission's resolution of these additional issues is guided by the provisions of the Telecommunications Act of 1996[1] and the rules developed by the FCC pursuant to the 1996 Act. Where differing results might be acceptable under the 1996 Act, we may also be guided by Montana law and Commission regulations. In addition, we do not consider issues that appeared to be resolved by compromise or otherwise during the informal meeting held on September 25, 1997.

COMMISSION DECISION

A. Part A

1. Issue No. A-1: Combinations - Part A, Definitions, p. 6; Virtual Collocation - Part A, p. 36, Section 40.2.1; Recitals section, Fourth *Whereas* - Part A; Attachment 3 - p. 1, 2, and 4, Section 1.2.2, Section 2.5, and Section 3.3; and Attachment 5 - p. 17, Section 3.2.15.1

1. After the Eighth Circuit issued its July 18, 1997 decision in Iowa Utils. Bd., the parties' interpretations of the Court's holdings differed dramatically. The Court's initial opinion and its October 14, 1997 order on rehearing invalidated certain FCC rules requiring the incumbent local exchange carriers to combine elements for competitive carriers and to provide elements in existing combinations. The Act and the Iowa Utils. Bd. opinions provide the following framework: (1) U S WEST must provide AT&T with access to unbundled network elements (UNEs); (2) AT&T can purchase any or all of the network elements it needs as unbundled elements; (3) U S WEST need not combine unbundled elements for AT&T, but U S WEST must provide the access to U S WEST's network that AT&T needs in order to recombine

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[1]Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (to be codified as amended in scattered sections of 47 U.S.C.).

the unbundled elements; and (4) although the FCC rule prohibiting the disassembling of currently combined elements (47 C.F.R. § 315(b)) has been vacated, the Act does not prohibit the sale of unseparated components as part of unbundled network elements.

2. U S WEST's advocacy in the pre-arbitration portion of this proceeding and throughout the arbitration hearing and post-hearing briefing period was consistent: U S WEST argued that there must be a "rebundling" charge[2] equal to the difference between the resale price and the unbundled element price, thereby making the charge the same for unbundled elements of a particular service as for resale of that service. The Commission accepted U S WEST's argument and determined that the price for unbundled elements should include the rebundling charge advocated by U S WEST--at least until permanent prices are developed.

3. U S WEST now contends that the Eighth Circuit's rejection of the rule preventing an incumbent LEC from separating network elements that it currently combines means that the interconnection agreement cannot require U S WEST to provide any elements in a combined state to AT&T. U S WEST further contends that it may sever existing connections between elements and require AT&T to recombine the elements inside a collocated cage in U S WEST's central office or, if no space is available, by virtual collocation.

4. According to AT&T, the FCC's Third Order on Reconsideration[3] stated that such actions by an incumbent local exchange carrier (ILEC) would impose costs on competitive local exchange carriers (CLEC) that the ILEC would not incur, and thus would violate the requirement

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[2]This has also been referred to as a "glue" charge.

[3]Third Order on Reconsideration, 12 F.C.C.R. 12460, CC 96-98, FCC 97-295 (rel. Aug. 18, 1997).

under § 251(c)(3) of the Act that ILECs provide nondiscriminatory access to unbundled elements. AT&T further asserts that although the Eighth Circuit ruled that a new entrant may achieve the capability to provide telecommunications services completely through access to unbundled elements, U S WEST inconsistently proposes to require AT&T to recombine the network elements it purchases while refusing to grant the access to its facilities that would be necessary with such a requirement.

5. U S WEST's proposed contract language would require all CLECs to own or control facilities to access unbundled elements. U S WEST would require CLECs to collocate equipment in U S WEST's central offices. U S WEST proposes to then unbundle elements that it has provided in combination and require each CLEC that wishes to provide services through unbundled elements to connect to the individual unbundled elements by use of cross-connects between U S WEST's facilities and the CLEC's facilities. If no space is available for a CLEC to do this, then U S WEST would require the CLEC to use virtual collocation to accomplish the element combinations required.

6. However, U S WEST states that it will not combine elements for a CLEC when the CLEC wishes to provide service via virtual collocation. Virtual collocation does not contemplate that a CLEC has access to its own collocated equipment; rather, the ILEC performs all functions for the CLEC with this arrangement. U S WEST's position on this begs the question: If there is no room to physically collocate, how is the CLEC going to physically locate the "cage" in which it will make its cross-connections? The simple answer is that the CLEC will not be able to combine unbundled elements at all and virtual collocation could only be used for pure facilities-based interconnection.

7. AT&T states that U S WEST's proposed resolution of this issue would delete all language in the juxtaposed agreement that deals with combinations. It argues that it is impossible for an interconnection agreement to be complete or to comply with the requirements of the 1996 Act unless it clearly and unambiguously describes how AT&T will be allowed to provide services through combinations of UNEs. It further argues that if the Commission determines that AT&T must combine elements that U S WEST has torn apart, the interconnection agreement must specifically provide: (1) how AT&T will have access to U S WEST's network to obtain and combine UNEs; and (2) the terms and conditions (including price) under which the UNEs will be available. According to AT&T's argument, it is not enough to simply delete provisions from the agreement which require U S WEST to provide elements in existing combinations; it is critical that the agreement contain details of combining and recombining, specific prices, and other particulars for implementation. AT&T states that the agreement as it now exists contemplated that U S WEST would provide UNEs in combination if requested by AT&T; therefore no provisions have been included for U S WEST to uncombine and AT&T to combine elements, and no information to provide for AT&T to gain access to U S WEST's network to accomplish the combination of elements U S WEST chooses to separate. According to AT&T, this would render the agreement fatally incomplete, create significant barriers to entry, and is contrary to the 1996 Act.

8. AT&T further asserts that the sole purpose of U S WEST's present intent to separate elements is to impose additional, artificial costs upon new entrants and their customers and to subject them to service outages of indefinite duration while the incumbent disconnects and the new entrant reconnects network elements that were already connected to each other. In

addition, AT&T argues that this Commission should not permit U S WEST to engage in such "blatantly anticompetitive conduct"--conduct which would violate Montana's prohibition on discriminatory and unreasonable conduct by carriers in § 69-3-321, MCA. It states that the sole purpose and effect of such conduct would be to impose costs on CLECs that U S WEST does not incur, and to ensure that new entrants competing through the purchase of UNEs are unable to provide service at parity with U S WEST.

9. AT&T argues that nothing in the federal Act or Montana law prohibits the Commission from adopting and enforcing under state law any duties that go beyond the minimal and non-exclusive requirements of the Act. It further states that, having successfully argued that state commissions have authority over the pricing rules for UNEs used to provide local service, U S WEST cannot now argue that the Commission lacks authority under 47 U.S.C. § 261(c) to impose additional requirements on U S WEST for the provision of UNEs to further competition. AT&T also cites § 601(c) of the Act as stating that the Act may not be construed to modify, impair, or supersede state or local law unless expressly provided in the Act or any subsequent amendments to the Act. AT&T argues that U S WEST should not be able to successfully contend now that any rule authorized by state law prohibiting it from separating network elements that are already combined is somehow preempted by the Act, when it has relied on these and other sections of the Act to preserve substantial state authority.

10. AT&T argues that a state requirement that imposes a more demanding and pro-competitive requirement on U S WEST than the federal Act does not conflict with the Act, but rather, it reasonably supplements U S WEST's obligations in a manner that complements the purposes of the federal Act. Such a state requirement would only hasten accomplishment of the

Act's primary objective which is to introduce competition into local exchange markets and erode the existing monopolistic nature of the industry. AT&T asserts that the Eighth Circuit has made it abundantly clear that the federal government has a limited role and the states have a significant role in the regulation of local exchange service.

11. The Eighth Circuit did in fact emphasize the significant and substantial role of state commissions under the 1996 Act. The Court stated that § 251 does not apply to state statutes or regulations that are independent from the 1996 Act and noted further that many states had opened local telephone markets to competition prior to the 1996 Act and that § 251(d)(3) was designed to preserve such work of the states. Iowa Utils. Bd., 120 F.3d at 806-07. The Court stated,

> With subsection 251(d)(3), Congress intended to preserve the states' traditional authority to regulate local telephone markets and meant to shield state access and interconnection orders from FCC preemption so long as the state rules are consistent with the requirements of section 251 and do not substantially prevent the implementation of section 251 or the purposes of Part II.

Id., at 807.

12. Montana's markets have always been open to competition. Even before the 1996 Act, pro-competitive statutes had long been in effect that required interconnection and structure sharing. *See, e.g.*, 69-6-101, MCA (repealed in 1997, after Congress passed the Telecommunications Act of 1996). Moreover, the Montana Legislature adopted a pro-competitive stance before the federal Act was enacted. *See, e.g.*, §§ 69-3-801 and 69-3-809, MCA.

13. U S WEST is unwilling to allow CLECs access to its network in any manner except by collocating equipment, which the Court expressly stated CLECs are not required to do. U S WEST's proposed contract terms would require AT&T to recombine elements that it has

chosen to unbundle, without permitting AT&T access to the elements to recombine them. It has taken the Eighth Circuit rulings to an illogical extreme. U S WEST cannot have it both ways– either it permits CLECs to purchase combined elements or it permits access to its network so that CLECs can perform the combinations, without requiring collocation.[4]

14. The record in this proceeding contains no evidence from which the Commission can determine that U S WEST will fulfill its obligation to provide AT&T with access to its network. The Eighth Circuit's July 18, 1997 opinion states that a CLEC who orders UNEs "is entitled to gain access to all unbundled elements that are sufficient, when combined by the requesting carrier, to enable the requesting carrier to provide telecommunications service." Iowa Utils. Bd., 120 F.3d at 815. The Court further stated that, "The fact that the ILECs object to this rule indicates to us that they would rather allow entrants access to their networks than have to rebundle the unbundled elements for them. Id., at 813. The materials before this Commission do not support the Court's conclusion.

15. The arguments that have been made in this proceeding do not demonstrate that U S WEST is willing to permit this access. U S WEST's advocacy is that CLECs can only obtain access to UNEs by collocating equipment in each central office that a CLEC wants to provide service from. Collocating a "cage" and the accompanying cost of connecting with U S WEST's network in every central office and by every CLEC is likely to be quite costly to new

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[4]Briefing by both parties in December 1997 to address the effect of the Eighth Circuit's October 14, 1997 ruling discusses alternatives to the dilemma created in this proceeding. AT&T suggests several alternatives to physical collocation and virtual collocation; U S WEST attached recent correspondence between the parties which refers to a Single Point of Termination (SPOT) method. However, the substance of the parties' arguments for alternatives is not part of the record and cannot be considered by the Commission at this time.

entrants and perhaps to U S WEST as well. Every CLEC wishing to use UNEs will have to collocate its own equipment in each U S WEST central office serving area the CLEC wishes to serve. This will drive up the cost for CLECs to provide service in competition with the ILEC and may constitute a barrier to CLEC entry, which this Commission cannot support.

16. Not only will CLECs incur additional costs which could be avoided, U S WEST will incur costs to unbundle combinations so that the CLEC can make its own combinations. It will incur further costs to recombine elements if the CLEC's customer returns to U S WEST, as will the CLEC to unbundle the elements from its connections. It makes little economic sense to require the CLEC to invest this heavily to enter the market. The use of UNEs to gain market entry should fulfill the goals of federal and state law to encourage competition; it should not have the effect of establishing a barrier to entry for the CLECs.

17. The Commission must ensure that its decision is consistent with the goals and policies of the federal Act and Montana law. We conclude preliminarily that the agreement should set forth detailed procedures for AT&T to obtain access to unbundled elements--procedures that do not conflict with the stated purposes in the Montana Telecommunications Act (MTA) to maintain universal service availability at affordable rates and to encourage competition in all telecommunications markets. Section 69-3-802, MCA. Absent such procedures, it is reasonable to restrict U S WEST from disassembling existing UNE combinations.

18. The Eighth Circuit orders preclude a CLEC's acquisition of already combined elements at cost-based rates. The Court stated that such would "obliterate the careful distinctions Congress has drawn in subsections 251(c)(3) and (4) between access to unbundled network elements on the one hand and the purchase at wholesale rates of an incumbent's telecommunica-

tions retail services for resale on the other." Iowa Utils. Bd., Order on Petitions for Rehearing, 135 F.3d 535, 1997 U.S. App. LEXIS 28652, at **3-4, *amending initial decision reported at* 120 F.3d at 813 (Oct. 14, 1997). U S WEST argues this holding also confirms that forcing it to combine UNEs for AT&T at cost-based rates undermines the distinction between resale and UNE pricing created by the Act and bars the Commission from imposing a state law requirement that U S WEST combine UNEs for AT&T. U S WEST further argues that any rule that prohibits an ILEC from separating network elements that it may currently combine is contrary to § 251(c)(3) and cannot stand. Therefore, according to U S WEST, the Commission cannot invoke state law authority to take action inconsistent with § 251 because any Commission decision imposing the vacated combination requirement would conflict with the 1996 Act and is preempted by the Act.

19. We disagree. U S WEST's argument is contrary to the Eighth Circuit's holding that CLECs can provide services entirely through the ILEC's unbundled elements without owning or controlling any of their own facilities. Although the FCC's rule prohibiting the disassembling of currently combined elements has been vacated, U S WEST must provide access to its network to enable AT&T to recombine elements, and it may not do so in such a way as to discriminate against other competing providers or to create anticompetitive barriers to entry.

20. U S WEST's position is also inconsistent with its prior argument in this Docket that the Commission should permit it to charge a "rebundling charge." The Commission accepted U S WEST's argument that the price for unbundled elements should include a rebundling charge--at least until permanent prices are developed. The Eighth Circuit precludes CLECs from acquiring UNEs at cost-based rates. The rebundling charge, advocated by

U S WEST and adopted by the Commission in the Arbitration Order, ensures that AT&T will not acquire UNEs at cost-based rates. Requiring U S WEST to provide UNE combinations only if paid a rebundling charge by the CLEC is not inconsistent with the Eighth Circuit's opinion.

21. Therefore, based on the parties' representations, the applicable state and federal law as discussed above, and the Commission's analysis of the issue presented, the following adjustments to the parties' agreement should be made:

a. Definition of Combinations (Part A, p. 6, Definitions Section): The definition is not consistent with the Eighth Circuit's October 14, 1997 decision on rehearing. It should either be deleted or clarified to state that U S WEST has no obligation to combine UNEs unless it refuses to allow AT&T sufficient access to its network--consistent with this Order--to make the combinations of elements necessary to provide the service to its customers.

b. Virtual Collocation (Part A, p. 36, Section 40.2.1): U S WEST's position on combining UNEs is inconsistent with the definition of "virtual collocation," with which AT&T would have no access to the facilities to physically combine UNEs. U S WEST's proposed language denying its obligation to combine UNEs should be revised to clarify that if AT&T does not have sufficient access to virtually collocated equipment used to combine UNEs, U S WEST shall perform the combination.

c. Recitals section, fourth *Whereas* (Part A, p. 87[5]): AT&T's proposed phrase should be deleted to conform to the Eighth Circuit's decision on rehearing. For further clarity the entire phrase "separately or in any combination" should be deleted.

d. Attachment 3 (p. 1, Section 1.2.2): U S WEST's proposed language is adopted; AT&T's proposed provision is inconsistent with the Eighth Circuit's decision on rehearing. The provision should include a statement reflecting the Commission's decision that existing combinations will not be unbundled unless the parties negotiate an amendment that provides for AT&T to gain access to U S WEST's network for purposes of combining elements.

e. Attachment 3 (p. 2, Section 2.5): AT&T's proposed term relating to the demarcation point is rejected as inconsistent with the Eighth Circuit's decision on rehearing.

f. Attachment 3 (p. 4, Section 3.3): AT&T's proposed language on combinations and the reference to provision of better service than U S WEST provides itself should be deleted. U S WEST must only provide services at parity to that which it provides itself, its affiliates, or any other third party.

g. Attachment 5 (p. 17, Section 3.2.15.1): The Commission is unclear what the intent is for this provision. The "combination" language is inconsistent with the Eighth Circuits decision on rehearing and should, therefore, be deleted. The provision should include a statement reflecting the Commission's decision relating to existing combinations, which will not

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[5]This page is numbered as "87" in the second draft provided to the Commission. In the first draft, numerous references were to "Utah" instead of Montana, and the page was numbered as "2" (there were two pages numbered as "2" in the first draft).

be unbundled unless the parties negotiate an amendment that provides for AT&T to gain access to U S WEST's network for purposes of combining elements.

2. Issue No. A-2: Intellectual Property - Part A, Section 5

22. As stated by U S WEST, the dispute over intellectual property provisions involves two distinct issues related to requests made by AT&T for a service that involves the intellectual property of a third party. The two issues are: (1) which party must obtain the third party's permission for the use of that intellectual property, and (2) who should bear the responsibility if that third party refuses to grant permission to sell or sublicense its intellectual property to AT&T?

23. U S WEST's position is that AT&T should bear the burden of obtaining the permission and paying any required fees to the third party. U S WEST further contends that it should not be held responsible for damages caused by a breach of the license agreements U S WEST holds with the third party owners. U S WEST states that its proposed contract language recognizes that it is not in a position to mandate that an independent, third party owner sell its property to anyone. U S WEST further states that it has offered to facilitate any negotiations between AT&T and the third party in an effort to facilitate AT&T's use of such third party property. If the third party owner refuses to grant AT&T permission, then U S WEST believes AT&T should be responsible for any damages caused by unlawful use of the third party intellectual property. U S WEST argues it is unreasonable and unfair if AT&T insists that U S WEST provide a service even if it means violating a license agreement, and that U S WEST must then bear responsibility for all damages resulting from such violation.

24. AT&T argues that U S WEST's contract term would prohibit CLEC access to some of the most vital network elements unless and until a new entrant negotiates a separate agreement with literally dozens of third parties whose intellectual property rights could be infringed by such access. AT&T asserts that the Act's requirement in § 251(c)(3) which permits new entrants' access to ILECs' network elements, is critical to effectively opening the local exchange market to competition. AT&T alleges that U S WEST's position is an attempt to impose a potentially fatal barrier to entry by CLECs in the local exchange market.

25. AT&T also makes the following assertions, which are undisputed by U S WEST:

(a) U S WEST has not established that the mere sale of UNEs to AT&T or any other CLEC would necessarily require an amendment to U S WEST's existing licenses. The provisioning of access to UNEs, according to AT&T, likely constitutes U S WEST's own use or an internal business purpose that would not require an additional license or any additional license fee.

(b) If it is necessary to amend existing licenses, the 1996 Act obligates U S WEST to obtain amendments instead of using its existing licenses as a shield to prevent competitive entry to local markets. The requirement in § 251(c) that U S WEST provide nondiscriminatory access to network elements means that the access received by CLECs and the element itself must be at least equal in quality to that which the ILEC provides to itself. This prevents the ILEC from prospectively entering into agreements with its vendors that would preclude it from providing nondiscriminatory access to its facilities to new entrants. AT&T asserts that U S WEST has an affirmative duty to negotiate future agreements to include any provisions that might be necessary to facilitate its obligations under the Act for services. It

further argues that U S WEST's existing licenses should be treated no differently because ¶ 202 of the FCC's Interconnection Order[6] requires U S WEST to make feasible modifications to its existing facilities in order to provide nondiscriminatory access to new entrants. Therefore, the Commission should conclude that the Act imposes on U S WEST an obligation to renegotiate its license agreements to ensure that CLECs are provided with access to its network that is at least equal in quality to that which U S WEST enjoys.

(c) U S WEST's obligation to negotiate license amendments is a part of the general policy requirement that ILECs' unique economies be shared with new entrants. Interconnection Order, at ¶ 11. U S WEST by virtue of its size and large capital investment, has leverage with existing vendors so that it can reopen licenses in the ordinary course of business and achieve cost economies and efficiencies otherwise unavailable to new entrants. On the other hand, AT&T and other CLECs would be forced to negotiate for the sole purpose of securing permission to use the vendors' intellectual property, and the likely result would be fees in excess of those paid by U S WEST as part of the purchase of the equipment.

(d) The FCC's Infrastructure Sharing Order[7] is analogous to this situation. The FCC rejected a similar argument by an ILEC that sharing intellectual property must be condi-

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[6]In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket 96-98, FCC 96-325, 11 F.C.C.R. 15499 (1996) (Interconnection Order), Order on Reconsideration, 11 F.C.C.R. 13042 (1996), Second Order on Reconsideration, 11 F.C.C.R. 19738 (1996), Third Order on Reconsideration, 12 F.C.C.R. 12460 (1997).

[7]In the Matter of Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996, Report and Order, 12 F.C.C.R. 5470 (Suppl.), CC Docket No. 96-237, FCC 97-36 (Feb. 7, 1997) (Infrastructure Sharing Order).

tioned on the qualifying carrier's obtaining a license from persons having a protected interest in the property, stating that § 259(a) of the Act requires ILECs to make available to any qualifying carrier such public switched network infrastructure, technology, information, and telecommunications facilities and functions as may be requested by the qualifying carrier for the purpose of enabling the carrier to provide telecommunications services. AT&T asserts that this order stands for the following: If the only way a CLEC such as AT&T can obtain access to U S WEST's network is to first modify the private contracts that U S WEST has with vendors, then U S WEST has the affirmative duty to seek and obtain those licenses from third parties and it is not enough for U S WEST to offer to "use reasonable efforts to facilitate" AT&T's negotiations with the vendors. AT&T argues that this Infrastructure Sharing Order is persuasive authority for requiring U S WEST to take steps, if necessary, to modify existing agreements and licenses as part of its broader duty to comply with the nondiscrimination obligations in the Act. U S WEST has every incentive to construe its existing contractual arrangements to preclude it from satisfying its obligation to provide nondiscriminatory access to UNEs.

26. AT&T's language requires each party to obtain consent of third parties if such consent is required to allow the other to use the party's respective network; this duty is appropriately the responsibility of the party who owns and operates the network. AT&T asserts that U S WEST should be ordered to obtain all necessary licenses from third parties, both prospectively and for existing agreements, so that AT&T can use U S WEST's facilities.

27. This issue is particularly difficult to resolve because the Commission has no information about the contents of U S WEST's existing intellectual property agreements. The record is devoid of information to shed light on what may actually be involved in obtaining

modifications or sublicenses to U S WEST's existing agreements, whether any such modifications or sublicenses are in fact necessary, and what obstacles may be present that prevent either U S WEST or AT&T from negotiating required changes. Further, there is no evidence that quantifies the number of sublicenses required or separate agreements that may have to be modified.

28. The issue is further complicated by U S WEST's refusal to grant AT&T any access to its network. See Issue No. A-1 above which discusses combination of elements. Added to that is the lack of legal precedent to guide our decision. The Commission's resolution of this issue must consider not only AT&T, but also other CLECs who may adopt AT&T's interconnection agreement as their own. Further, the Commission's decision may affect other CLECs who negotiate their own agreements with U S WEST. Finally, we have no record evidence or other source from which to conclude that access to unbundled elements as contemplated by the 1996 Act can be classed as anything other than U S WEST's own use of third party intellectual property.

29. Given this lack of evidentiary and noticeable material, the Commission concludes that its decision should be based on the pro-competitive policies set forth in Montana and federal law. The Commission concludes that U S WEST has not made a persuasive argument to support its position. U S WEST's proposed contract language states that U S WEST will "use reasonable efforts to provide a list of all known and necessary Third Party Intellectual Property applicable to the other Party, and, to the extent necessary, use reasonable efforts to facilitate the negotiation of any necessary licenses." The record is bare as to whether U S WEST has taken any steps to facilitate negotiations for AT&T or any other CLEC.

30. The Commission has approved nearly thirty interconnection agreements to date. Rarely a week goes by without at least one filing for approval of an agreement between U S WEST and another party--for resale, for unbundled elements, for facilities interconnection, or a combination of the three. There is no indication that this will slow down; rather, although anecdotal, Commission staff has had indications that there are a number of new entrants who are either in the process of negotiating agreements with U S WEST, or are waiting for this AT&T contract to become effective so they can adopt it as their own.

31. For Montana agreements alone, third party vendors could be inundated with requests for licenses. These licenses would likely be different than the licenses U S WEST obtains for itself as the owner of the network facilities. The CLECs may need to be privy to U S WEST's agreements so they can understand what it is they need to have a license to use. It would seem much simpler and more efficient for U S WEST to negotiate these sublicenses so that all CLECs are covered by them. Therefore, the Commission rejects U S WEST's proposed Section 5.3.

32. From that conclusion, it seems the logical next step is to require U S WEST to bear the cost of obtaining these sublicenses for CLECs because to require payment of AT&T and/or other CLECs who have already executed agreements with U S WEST for interconnection would place an unproportionate share of costs on these CLECs. The Commission rejects U S WEST's contract Section 5.2, which would have required CLECs to obtain a license or permission for access or use of intellectual property, to make all payment to obtain the license, and to provide evidence of the license.

33. The Commission accepts AT&T's proposed language in the last sentence of its proposed Section 5.1 as a preferable alternative to U S WEST's Sections 5.2 and 5.3. The Commission also accepts other language in AT&T's proposed Section 5.1, which is similar to that of U S WEST's Section 5.4. The deleted language in AT&T's 5.1 appears to allow a party to unilaterally determine when the other party can grant non-exclusive languages; U S WEST's correlative language would permit a party to treat the intellectual property as if it were not joint property. The Commission has received no evidence or briefing on either party's position relating to use of jointly-owned intellectual property.

34. Not all language in these proposed clauses is accepted, however, and corrections should be made as shown below. The Commission has rejected and accepted certain parts of the parties' several sections on intellectual property. Because of the way they are drafted, it is not possible to accept either party's sections in full. The first two sentences and the last sentence in AT&T's Section 5.1, accepted by the Commission, should read as follows:

> 5.1 Any intellectual property jointly developed in the course of performing this Agreement shall belong to both Parties ~~who shall have the right to grant non-exclusive licenses to third parties except as otherwise designated in writing by one Party to another.~~ Any intellectual property which originates from or is developed by a Party shall remain in the exclusive ownership of that Party. ~~Except for a limited license to use patents or copyrights to the extent necessary for the Parties to use any facilities or equipment (including software) or to receive any service solely as provided under this Agreement, no license in patent, copyright, trademark or trade secret, or other proprietary or intellectual property presently or hereafter owned, controlled or licensable by a Party, is granted to the other Party or shall be implied or arise by estoppel.~~ It is the responsibility of each Party to ensure at no additional cost to the other Party that it has obtained any necessary licenses in relation to intellectual property of third parties used in its network that may be required to enable the other party to use

> any facilities or equipment (including software), to receive any service, or to perform its respective obligations under this Agreement.

35. The emboldened language stricken above should be deleted; the Commission finds U S WEST's analogous section 5.1 a more complete provision as it includes trade secrets in the grant of the right to use. The remainder of U S WEST's indemnification sections are not accepted; AT&T's proposed Section 5.2--relating to indemnification--is not accepted. See Issue No. A-4 below, explaining the Commission's rationale for the indemnification issue.

3. Issue No. A-4: Indemnification - Part A, Section 18

36. The indemnification section is directly related to the intellectual property provisions. The parties have agreed to most of the substance of the indemnification provisions in Section 18 of the parties' agreement. In our discussion of the next previous issue, the Commission rejected AT&T's proposed indemnification term in AT&T's proposed Section 5.2. U S WEST's proposed term relating to indemnification for damages arising with regard to third party intellectual property, Section 18.1, is similarly rejected. AT&T's language would require U S WEST to indemnify for actions arising pursuant to AT&T's use of third party intellectual property; U S WEST's language does the opposite--it would completely indemnify U S WEST from any claim arising pursuant to third party intellectual property. The Commission concludes that neither provision is appropriate, considering the lack of information with which to decide the related issue. Under the circumstances, it is better that liability for such claims be determined individually on a case-by-case basis. That should incent both parties to work for a resolution of intellectual property sublicensing.

4. Issue No. A-5: Limitation of Liability - Part A, Section 19

37. U S WEST contends that its language should govern the parties' agreement because it reflects the traditional limitations of liability as set forth in its tariffs. AT&T argues that an additional clause should be inserted which would permit the Commission, an arbitrator, or other decision maker to award consequential damages if such decision maker determines that a "pattern of conduct" justifies consequential damages.

38. AT&T expressed a concern that U S WEST could evade its obligations under the Act by engaging in a pattern of seemingly *de minimus* contract breaches which, when taken together, constitute a serious impairment of rights. AT&T has not made a persuasive argument for including this clause in a contract of this nature. The Commission accepts U S WEST's version of Section 19.3, which is language that both parties have agreed upon without the phrase pertaining to a "pattern of conduct."

5. Issue No. A-6: Notice of New Changes - Part A, Section 23.2

39. At the September 25, 1997 informal meeting with Commission staff, the parties represented to staff that they had agreed to a compromise on this issue.

6. Issue No. A-7: Directory Listings (Commissions) - Part A, Section 44.1.12

40. At the September 25, 1997 informal meeting with Commission staff, the parties represented to staff that they had agreed to a compromise on this issue.

7. Issue No. A-8: Treatment by Directory Publishing Affiliates - Part A, Section 44.1.7

41. At the September 25, 1997 informal meeting with Commission staff, the parties represented to staff that they had reached agreement on this issue.

8. Issue No. A-9: U S WEST Customer Database Revenues - Part A, Section 44.2.1

42. This issue concerns the sale of directory listings to third parties. U S WEST has made such sales while it has enjoyed a monopoly in the local exchange market. AT&T believes it should receive a pro rata share of revenues from such sales. AT&T concedes that listing its customers in U S WEST's directories benefits AT&T. However, AT&T contends that listing AT&T's customers in U S WEST's directories also benefits U S WEST. AT&T notes that U S WEST must list CLECs' customer listings in its directories to comply with § 271(c)(2)(B)(iii) of the 1996 Act, the "competitive checklist" for entry into the interLATA long distance market. Further, AT&T states that U S WEST can claim its directories are "complete" because they include all customers--even its competitors' customers--and that this completeness increases the value of U S WEST's directories to U S WEST and its customers. This, according to AT&T, gives U S WEST an advantage when it markets its directory listing database.

43. U S WEST proposes to retain all revenues from the sale of all directory listings, including AT&T's customers and presumably those of other CLECs. U S WEST states that it has marketed such lists for many years and has maintained and updated the database at its own expense. U S WEST states that it will not charge AT&T for any AT&T listing in the U S WEST database and AT&T's argument that U S WEST will unfairly benefit from the sale of AT&T's listings is without merit, because AT&T can build, maintain and market its own database to the same providers for inclusion in the same directories as U S WEST does. U S WEST argues that it is inequitable for AT&T to expect payment when, at the same time, AT&T is making demands on U S WEST to include AT&T's listings in U S WEST's white pages.

44. Neither party has cited any statute or regulation to support its arguments. U S WEST must include CLECs' customer listings in order to be permitted to enter the in-region interLATA toll market. Clearly there is benefit to U S WEST for maintaining the database. Further, both parties benefit when their customers are included in the same directory. Therefore, the Commission concludes that U S WEST may not sell AT&T's customer listings without its permission unless it compensates AT&T for its pro rata share of the directory listings database. U S WEST's database customers will likely expect a complete list, and U S WEST can advise them to contact AT&T to purchase a list of AT&T's customers.

9. Issues No. A-10, A-11, A-13, and A-14: Call Monitoring of Directory Assistance Service Centers - Part A, Sections 50.2.3.7 and 50.2.3.7.1; Call Monitoring of Operator Service Centers - Part A, Sections 50.3.5 and 50.3.5.1

45. At the September 25, 1997 informal meeting with Commission staff, the parties represented to staff that they had agreed to use language which they had worked out in their similar Idaho negotiations.

10. Issue No. A-12: Instant Credit for Operator Services - Part A, Section 50.3.3.2(o)

46. This issue concerns how U S WEST will recover from AT&T the cost for the underlying service that U S WEST provides to AT&T's end users when it credits a customer for a call after calling the operator with a complaint. U S WEST will offer a credit to the end user in these cases; that is not the dispute here. U S WEST believes that AT&T should pay for the operator services that U S WEST provides to the end user in arranging for the credit. U S WEST proposes to charge 36 cents for each local call unless it determines that U S WEST was not

responsible for the problem. In the latter case, AT&T will not have to pay for the operator services provided. This is not a question of credit to the customer.

47. The Commission agrees with U S WEST's position and accepts U S WEST's proposed language. Much of AT&T's proposed term relates to calls referred to AT&T toll-free numbers, an issue not discussed in the parties' briefs.

B. Attachment 1: Rates and Charges

1. Issue No. 1-1: Construction Charges - Attachment 1, Section 3.2

48. AT&T opposes the following contract language proposed by U S WEST:

> U S WEST will provide unbundled Network Elements through U S WEST's existing facilities. U S WEST is not required to construct new facilities to accommodate AT&T requests for unbundled network elements.

49. The Eighth Circuit held that the Act does not require an ILEC to provide superior quality interconnection and unbundled access. Rather, it requires access to the existing network, notwithstanding the fact that the new entrant is willing to compensate the ILEC for superior quality. U S WEST interprets Iowa Utils. Bd. to require it to offer only its existing facilities to provide UNEs to AT&T. According to U S WEST, that case clearly states that U S WEST need not accommodate AT&T's requests for new facilities even if AT&T is willing to pay for such construction. U S WEST wants the proposed language included "to clearly define U S WEST's obligations related to construction of facilities." AT&T argues that the proposed language would nullify other contract provisions relating to construction of facilities which the parties have already agreed upon.

50. The Commission addressed this issue in its Arbitration Order in this Docket dated March 20, 1997. Order No. 5961b required that U S WEST provide superior facilities upon

request by AT&T. The Eighth Circuit thereafter ruled that U S WEST need not honor requests from CLECs to construct superior facilities. That ruling, however, does not obliterate the Commission's decision. Although AT&T may not require U S WEST to construct superior facilities, U S WEST must still construct facilities where it would construct them for its own end-user customer. Like the end-user customer, AT&T is also U S WEST's customer.

51. U S WEST's proposed contract language would void the construction obligation imposed upon it by §§ 251(c)(2) and (c)(3) of the 1996 Act, which require an ILEC to construct facilities necessary to accommodate a CLEC's access to UNEs or interconnection. A clear example of this obligation is the requirement that U S WEST invest in upgraded Operations Support Systems (OSS)--one of the required unbundled elements.

52. More important, however, is U S WEST's obligation under state law. In Order No. 5961b, the Commission made a policy ruling requiring U S WEST to construct facilities requested by AT&T when U S WEST would construct those facilities for its own customers. Billing for such construction is to be determined in the same manner as U S WEST currently bills its customers pursuant to its tariffs on file with the Commission. For resold services, the Commission's decision clearly imposed an obligation on U S WEST to construct facilities for AT&T. This policy decision recognizes that AT&T is in fact a customer of U S WEST and should have the same expectations regarding U S WEST's construction policies as U S WEST's end user customers. It is reasonable to extend that decision to require construction when a CLEC requests facilities when providing service through unbundled elements obtained from U S WEST.

53. The Commission has also designated U S WEST as an eligible telecommunications carrier with respect to the federal universal service support program. U S WEST signed a self-certification form stating that it offers the services supported by the fund throughout its service territory in Montana.

54. The Commission concludes that U S WEST has an involuntary obligation to construct some facilities when AT&T provides service using U S WEST's UNEs, limited only by U S WEST's general regulatory service obligation to customers in its service territory. U S WEST's proposed Section 3.2 may conflict with existing law and should be deleted from the parties' contract.

2. Issue No. 1-2: Loop Conditioning - Attachment 1, Section 4.2

55. During the September 25, 1997 informal staff meeting, it became apparent that there was no real dispute on this issue. The parties agreed to draft clearer language to substitute for Section 4.2.

3. Issue No. 1-3: Compensation for transport and termination - Attachment 1, Section 5

56. At the September 25, 1997 informal staff meeting, the parties agreed to substitute the language they had agreed to in Idaho for this section.

C. Part 3.

1. Issue No. 3-1: Combinations of Network Elements - Attachment 3, Section 1.2.2

57. See the discussion and resolution of Issue No. A-1.

2. Issue No. 3-2: Combinations and Demarcation Points - Attachment 3, Section 2.5

58. See the discussion and resolution of Issue No. A-1.

3. Issue No. 3-3: "Combinations of Network Elements - Attachment 3, Section 3.3

59. See the discussion and resolution of Issue No. A-1.

4. Issue No. 3-4: Shared Transport - Attachment 3, Section 5

60. This issue concerns whether U S WEST must unbundle common local transport between U S WEST's central offices and whether not doing so would violate the 1996 Act by impairing the rights of CLECs. U S WEST argues that AT&T's proposed shared transport language violates the Eighth Circuit's decision holding that ILECs do not have to combine network elements on behalf of a requesting carrier, and requests that AT&T's proposed term be rejected. AT&T contends that U S WEST's proposal reverses routing priority by consigning AT&T's traffic to the more costly transmission path in violation of the nondiscrimination mandates of the Act.

61. In its Interconnection Order,[8] the FCC expressly required ILECs to provide unbundled access to shared transmission facilities between end offices and the tandem switch. The dispute here, however, is over whether U S WEST must do so between end offices. The FCC addressed this issue in its Third Order on Reconsideration in the same docket,[9] and specifically rejected the argument U S WEST has made here, concluding that ILECs must

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[8]Interconnection Order, 11 F.C.C.R. at 15706, at ¶ 412.

[9]Third Order on Reconsideration, 12 F.C.C.R. 5482, ¶ 25.

provide shared transport between end offices, between tandems, and between tandems and end offices. As this FCC decision has not been stayed or overturned, this Commission is bound to follow it. The Commission accepts AT&T's language because it is consistent with the 1996 Act and the FCC's orders implementing the Act.

5. Issue No. 3-5: Performance Standards - Attachment 3, Section 18.2

62. During the September 25, 1998 informal staff meeting, the parties agreed to withdraw this issue and to use the Idaho provision in their agreement.

D. Part 4.

1. Issue No. 4-1: Local/Toll Combined Traffic - Attachment 4, Section 8.2.1

63. AT&T wants to combine both toll and local traffic originating in AT&T's switches and terminating in U S WEST's end offices on the same interoffice trunk group. AT&T agrees to comply with specific conditions requiring it to measure the types of traffic carried on the trunks for billing purposes. It also agrees to limit the amount of local traffic carried on the trunks to minimize the blockage of toll traffic on them. U S WEST objects to AT&T's proposal, and would require AT&T to use separate trunk groups for its toll and local traffic.

64. AT&T explains that it initially believed that U S WEST required separate trunks for toll and local traffic because it was technically infeasible to combine them. AT&T asserts that it has since learned that U S WEST's separate trunking requirement is a choice it has made for policy reasons. AT&T argues that U S WEST's proposal to require AT&T to have one trunk group for toll traffic and another for local traffic is costly, inefficient and unnecessary. Moreover, there is no technical reason why both local and toll traffic cannot be carried over the same trunk group.

65. AT&T concedes that allowing too much local traffic to be carried over a trunk group that also carries toll traffic can cause excessive blockage of the toll traffic. Accordingly, AT&T has proposed safeguards that would substantially mitigate this concern. AT&T offers to provide a verifiable and auditable means of assuring U S WEST that AT&T is complying with these safeguards. AT&T will also provide a measure of the amount of local and toll traffic on the trunk groups for billing purposes. Further, AT&T will pay U S WEST access charges for toll traffic and transport and termination charges for local traffic.

66. U S WEST contends that AT&T's request to combine toll and local traffic is an attempt by AT&T to avoid the costs and risks of entering the local telephone market using UNEs. U S WEST states that it currently separates its local and toll traffic in different trunk groups.

67. U S WEST is concerned that combining the traffic will degrade the quality of access services it provides to interexchange companies (IXCs). According to U S WEST, it wants to ensure that it meets its grade-of-service obligations to IXCs. U S WEST states that local traffic is engineered at a lower engineering (blocking) criterion than access traffic. Further, U S WEST states that AT&T can unilaterally decide to route local traffic over its toll trunks, but this decision could affect other carriers because the trunks are engineered to send overflow traffic through U S WEST's tandem switch. According to U S WEST, this could result in AT&T's local traffic mixing with other carriers' traffic on the same trunk group. Finally, U S WEST states that if AT&T prevails on this issue, other CLECs may adopt this contract and the cumulative impacts on U S WEST's facilities could seriously degrade the quality of U S WEST's access services.

68. The Commission concludes that U S WEST has not argued persuasively that combining local and toll traffic in the same trunk group is technically feasible or particularly harmful to its network, especially in light of the safeguards that AT&T has proposed. Further, the FCC clearly prohibits U S WEST from requiring AT&T and any other requesting carrier to use separate trunk groups to provide exchange access service (for tolls calls) and to provide local exchange service. *See* Third Order on Reconsideration, 12 F.C.C.R. 5487-97, ¶¶ 38, 39 and 52.

E. Part 7.

1. Issue No. 7-1: Operational Support Systems - Attachment 7, Section 9.1

69. At the informal staff meeting held on September 25, 1997, the parties agreed to resolve this issue with language from their Idaho agreement.

CONCLUSIONS OF LAW

1. The Commission has authority to supervise, regulate and control public utilities. Section 69-3-102, MCA. U S WEST and AT&T are public utilities offering regulated telecommunications services in the State of Montana. Section 69-3-101, MCA.

2. The Commission has authority to do all things necessary and convenient in the exercise of the powers granted to it by the Montana Legislature and to regulate the mode and manner of all investigations and hearings of public utilities and other parties before it. Section 69-3-103, MCA.

3. The United States Congress enacted the Telecommunications Act of 1996 to encourage competition in the telecommunications industry. Congress gave responsibility for much of the implementation of the 1996 Act to the states, to be handled by the state agency with regulatory control over telecommunications carriers. *See generally*, Telecommunications Act of

1996, Pub. L. No. 104-104, 110 Stat. 56 (*amending scattered sections of the* Communications Act of 1934, 47 U.S.C. §§ 151, *et seq.*). The Montana Public Service Commission is the Montana agency charged with regulating telecommunications carriers in Montana and properly exercises jurisdiction in this Docket pursuant to Title 69, Chapter 3, MCA.

4. Adequate public notice and an opportunity to be heard has been provided to all interested parties in this Docket, as required by the Montana Administrative Procedure Act, Title 2, Chapter 4, MCA.

5. The 1996 Act permits either party to a negotiation pursuant to 47 U.S.C. § 251 to petition this Commission to arbitrate any open issues in the negotiation of an interconnection contract, according to the parameters included in 47 U.S.C. § 252(b)(1).

6. Arbitration by the Commission is subject to the requirements of federal law as set forth in 47 U.S.C. § 252. Section 252(b)(4)(A) limits the Commission's consideration of a petition for arbitration to the issues set forth in the petition and the response and to imposing appropriate conditions as required to implement § 251(c) upon the parties to the agreement.

7. In resolving by arbitrating under 47 U.S.C. § 252(b) and imposing conditions upon the parties to the agreement, the Commission is required to (1) ensure that the resolution and conditions meet the requirements of § 251, including the FCC regulations prescribed pursuant to § 251; (2) establish rates for interconnection, services, or network elements according to the pricing standards in subsection (d); and (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement. 47 U.S.C. § 252(c). The resolution of the disputed issues in this Docket meets the requirements of 47 U.S.C. § 252(c).

The FCC's regulations adopted to implement § 251 of the Telecommunications Act of 1996 are binding on this Commission, except the sections relating to the pricing and the "pick and choose" rules which were stayed by the U.S. Court of Appeals for the Eighth Circuit pending consolidated appeals; *inter alia*, subsequently vacated by the Eighth Circuit; and are now pending appeal before the United States Supreme Court in Iowa Utils. Bd. v. FCC, 120 F.3d 753 (1997), *cert. granted*, 118 S.Ct. 683.

8. The Commission properly decides all issues presented by the parties, including disputes arising following resolution of the issues presented in the petition for arbitration. Section 252(c) of the 1996 Act does not limit the matters that may be arbitrated by the Commission, except the express provision that requires state commissions to limit consideration to the issues set forth by the parties in the petition and the response. 47 U.S.C. § 252 does not limit the issues that the parties may request the Commission to arbitrate and does not require that the Commission only resolve issues identified as unresolved at the time of the arbitration.

9. Where the Commission has regulatory jurisdiction, it must apply federal law as well as state law, and where Congress has preempted state law, the Federal law prevails. *See* FERC v. Mississippi, 102 S.Ct. 2126 (1982).

ORDER

THEREFORE, based upon the foregoing, it is ORDERED that the issues presented for Commission decision following the initial arbitration are resolved as set forth above; and

IT IS FURTHER ORDERED that a single executed agreement incorporating the provisions of this Order, Order No. 5961b, and Order No. 5961c shall be filed with the Commission for approval within 14 days of service of this ORDER.

DONE AND DATED this 21st day of April, 1998, by a vote of 5-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

DAVE FISHER, Chairman

NANCY MCCAFFREE, Vice Chair

BOB ANDERSON, Commissioner

DANNY OBERG, Commissioner

BOB ROWE, Commissioner

ATTEST:

Kathlene M. Anderson
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.

MONTANA PUBLIC SERVICE COMMISSION

CERTIFICATE OF SERVICE

* * * * * *

I hereby certify that a copy of an ORDER ON SUPPLEMENTAL DISPUTED ISSUES, in Docket D96.11.200, in the matter of AT&T AND USWC, dated April 30, 1998, has today been served on all parties listed on the Commission's most current service list, updated 5/14/97, by mailing a copy thereof to each party by first class mail, postage prepaid.

Date: April 30, 1998

Phyllis Thompson

For The Commission

Intervenors

Montana Consumer Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

AT&T COMMUNICATIONS OF THE SOUTHWEST, INC., Plaintiff	§	
VS.	§	NO. A-97-CA-029-SS (Consolidated under A-97-CA-132-SS)
SOUTHWESTERN BELL TELEPHONE COMPANY and THE COMMISSIONERS OF THE PUBLIC UTILITY COMMISSION OF TEXAS, Defendants	§	

ORDER

This suit concerns judicial review of an interconnection agreement between the plaintiff AT&T Communications of the Southwest, Inc. ("AT&T") and the defendant Southwestern Bell Telephone Company ("SWBT"). The interconnection agreement was arbitrated and approved by the Public Utility Commission ("PUC") pursuant to §§ 251 and 252 of the Telecommunications Act of 1996, 47 U.S.C. §§ 251-261, Pub. L. No. 104, 110 Stat. 56 (1996) (the "FTA" or the "Act"). The PUC has arbitrated and approved other interconnection agreements between SWBT and various competing telecommunications carriers in addition to AT&T, and challenges to numerous aspects of those interconnection agreements are currently pending in this consolidated Cause No. A-97-CA-132-SS, styled *Southwestern Bell Telephone Company v. AT&T Communications of the Southwest, Inc., et al.*

Before the Court are SWBT's Contingent Rule 12(b)(7) Motion to Abate or Dismiss, filed February 10, 1997 [#7]; SWBT's Motion to Dismiss Pursuant to Rule 12(b)(6) and 12(b)(1), filed

195

February 18, 1997 [#11]; AT&T's Motion for Stay and Referral to the Federal Communications Commission ("FCC"), filed March 13, 1997 [#21]; the PUC Commissioners' Motion for Summary Judgment, filed April 9, 1997 [#38]; AT&T's Contingent Motion for Summary Judgment, filed May 16, 1997 [#77]; and SWBT's Contingent Motion for Summary Judgment, filed May 30, 1997 [#89]. Also before the Court is the FCC's *Amicus Curiae* Brief in Support of Primary Jurisdiction Referral, filed March 28, 1997 [#36].[1]

I.

In this lawsuit, AT&T claims that two aspects of its interconnection agreement with SWBT violate certain provisions of the FTA and the applicable implementing regulations promulgated by the FCC.[2] AT&T raises the following two issues in its amended complaint: (i) whether SWBT's obligation under § 251(c)(3) of the FTA to provide AT&T and other competing telecommunications carriers with nondiscriminatory access to SWBT's unbundled network elements requires SWBT, rather than AT&T, to obtain any necessary licenses or right to use agreements from SWBT's third-party vendors of intellectual property, such as hardware and/or software ("the intellectual property dispute"); and (ii) whether SWBT is required under § 251(b)(2) of the FTA to provide AT&T and

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[1] SWBT's Motion to Abate and Motion for Summary Judgment are both contingent on the Court's denial of SWBT's Motion to Dismiss Pursuant to Rule 12(b)(6) and 12(b)(1), while AT&T's Motion for Summary Judgment is contingent on the Court's denial of its Motion for Stay and Referral to the FCC.

[2] The FCC's findings and rules pertaining to the local competition provisions of the FTA are contained in the First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98 (Aug. 8, 1996) ("First Report and Order"). The First Report and Order was challenged in a consolidated action in the Eighth Circuit, which vacated, among other things, the FCC's pricing rules and so-called "pick and choose" rules. *See Iowa Utilities Bd. v. Federal Communications Commission*, 120 F.3d 753, 791-801 (8th Cir. 1997).

other competing telecommunications carriers with a method of number portability[3] known as "route indexing" ("the number portability dispute").

With regard to the intellectual property dispute, the relevant statutory provision provides as follows:

> . . . [E]ach incumbent local exchange carrier has the following duties:
>
> **(3) Unbundled access**
>
> The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

47 U.S.C. § 251(3). Regarding the number portability dispute, the Act provides that each incumbent LEC has the "duty to provide, to the extent technically feasible, number portability in accordance with the requirements prescribed by the Commission." 47 U.S.C. § 251(b)(2).

The interconnection agreement between SWBT and AT&T requires SWBT to provide AT&T with "a list of all known and necessary licenses or right to use agreements applicable to the subject Network Element(s) within seven days of a request for such a list by AT&T." *See* Commissioners' Motion for Summary Judgment, Exh. C, Interconnection Agreement at ¶ 7.2.2. Although SWBT must use its "best efforts to facilitate the obtaining" of any license or right to use agreement, it is AT&T's responsibility to negotiate all such necessary agreements. *See id.* If a license or agreement cannot be obtained, SWBT must work with AT&T to develop an alternate element or service. *See*

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[3] Number portability simply means that customers do not have to change their telephone numbers when they change carriers.

id. AT&T's amended complaint alleges that the onus is on SWBT to negotiate amendments to its licenses and right to use agreements with third party vendors; the PUC's failure to impose such an obligation on SWBT, AT&T argues, creates an economic barrier to entry that the FTA was intended to dismantle. *See, e.g.*, AT&T's Consolidated Memorandum at 10 ("Because AT&T and other new entrants have no purchasing or bargaining power with SWBT's vendors which is remotely comparable to SWBT's, they are in no position to obtain such licenses on reasonable terms that would enable them to compete effectively."). The interconnection agreement further requires SWBT to provide the two methods of number portability—remote call forwarding ("RCF") and direct inward dialing ("DID")—the FCC determined to be "technically feasible" under the Act at the time the FCC issued its First Report and Order. *See* Commissioners' Motion for Summary Judgment, Exh. C, Attach. 14 at ¶ 3.1; First Report and Order, *In re Telephone Number Portability*, CC Docket No. 95-116, 11 FCC Rcd. 8352, 8409 ¶ 110 (July 2, 1996). AT&T asserts that route indexing is comparable to RCF and DID and is technically feasible; AT&T therefore argues that SWBT should be required to offer it under the Act.

II.

SWBT moves to dismiss AT&T's claim regarding the intellectual property dispute on the ground that the PUC does not have the power to transfer third parties' intellectual property to AT&T. Further, SWBT asserts AT&T is seeking the right to use intellectual property owned by third parties without obtaining their consent and without providing compensation to those third parties for the use of their intellectual property. Alternatively, SWBT moves to abate the action "until AT&T joins as parties all of those whose rights AT&T seeks to expropriate." *See* SWBT's Contingent Motion to Abate at 1. SWBT also seeks dismissal of AT&T's claim relating the number portability dispute on the ground that route indexing is not specifically mandated by FCC regulations.

There is no question AT&T's amended complaint states two viable claims. First, as AT&T reiterated in its subsequent pleadings, SWBT fundamentally mischaracterizes AT&T's claims regarding the intellectual property dispute. AT&T does not seek, as SWBT alleges, to expropriate the intellectual property of third parties with whom SWBT has licensing or right to use agreements. Rather, AT&T merely seeks clarification of the obligations SWBT has under the Act, if any, to procure licensing and right to use agreements on behalf of AT&T and other requesting carriers to the extent such agreements are necessary for SWBT to provide certain unbundled network elements. Second, the nature of SWBT's attack on AT&T's number portability claim relates to the merits of the claim and is more appropriately raised in SWBT's motion for summary judgment. Accordingly, SWBT's motion to dismiss and contingent motion to abate are without merit and should be denied. The only remaining issue, then, is whether summary judgment or referral to the FCC is the proper course of action. Despite having initially sought judicial review of the interconnection agreement in federal court, AT&T now asserts, and the FCC agrees, that the intellectual property and number portability disputes should be referred to the FCC under the primary jurisdiction doctrine. Because a determination that the issues raised in AT&T's amended complaint are appropriate for referral to the FCC would obviate the need for a ruling on the summary judgment motions filed by all parties to this suit, the Court will consider AT&T's motion for stay and referral first.

The primary jurisdiction doctrine is a judicially created doctrine that is invoked "when enforcement of [a] claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." *United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 63-64, 77 S. Ct. 161, 165 (1956). The district court, within its discretion, may dismiss or stay the suit pending the resolution of all or some portion of the action by the relevant administrative agency. *See Reiter v. Cooper*, 507 U.S. 258, 268-69, 113 S. Ct. 1213,

1220 (1993); *Wagner & Brown v. ANR Pipeline Co.*, 837 F.2d 199, 210 (5th Cir. 1988). The Court must weigh the parties' need to resolve the action expeditiously against the benefits of obtaining the federal agency's expertise on a particular issue. *See Gulf States Utilities Co. v. Alabama Power Co.*, 824 F.2d 1465, 1473, *opinion amended by* 831 F.2d 557 (5th Cir. 1987). Significantly, application of the doctrine is particularly appropriate where "uniformity of certain types of administrative decisions is desirable, or where there is a need for the expert and specialized knowledge of the agencies." *See Wagner*, 837 F.2d at 201 (quoting *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 919 (5th Cir. 1983) (quotations omitted)). Conversely, "when the agency's position is sufficiently clear or nontechnical or when the issue is peripheral to the main litigation, courts should be very reluctant to refer." *See Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 532 F.2d 412, 419 (5th Cir. 1976). The Court can defer to the agency "only if the benefits of agency review exceed the costs imposed on the parties." *See Wagner*, 837 F.2d at 210

Applying these guidelines to the issues raised in the intellectual property dispute, the Court concludes that deferral to the FCC is appropriate on that claim. First, the relationship of § 251(c)(3) to the intellectual property rights of third parties who have licensed their intellectual property to incumbent LECs for use in the LECs' physical facilities is precisely the type of issue within the FCC's special competence. For instance, in drawing its conclusion that incumbent LECs should bear the burden of negotiating amendments to their already-existing licensing agreements with third parties, AT&T examined the comparative economic positions of incumbent LECs and requesting carriers. AT&T further argued that "SWBT has an unqualified duty under the 1996 Act to provide nondiscriminatory access to the elements of its network [and] that SWBT cannot evade those duties by virtue of its agreements with third parties." AT&T's Reply Brief at 4. SWBT, on the other hand, argues that the Act "neither states nor suggests that an incumbent [LEC] must give a [requesting

carrier] something the LEC does not control—the intellectual property owned by third party vendors who have allowed the LEC to use that property pursuant to limited licenses." SWBT's Response Brief at 3. SWBT also argues that requiring all carriers to obtain necessary licenses and right to use agreements is, by definition, nondiscriminatory and therefore lawful under the Act. The FCC is in a far better position than this Court to evaluate these competing economic and policy concerns in light of the overall statutory structure and goals of the FTA; moreover, the need for uniform national standards on this issue is great.[4]

Although the FCC has yet to speak directly on this issue, the dispute has been raised in another proceeding pending before the FCC. *See* Petition of MCI for Declaratory Ruling, Docket CCBPol 97-4 and CC Docket No. 96-98 (March 11, 1997). On March 14, 1997, the FCC issued a public notice that interested parties should file all comments on this matter by May 6, 1997. *See* Public Notice, *Pleading Cycle Established for Comments on Petition of MCI for Declaratory Ruling*, CCBPol 97-4 and CC Docket No. 96-98 (March 14, 1997). Although the FCC has not yet issued its ruling, the FCC assures the Court in its *amicus* brief that it will act expeditiously to resolve this matter upon a referral by this Court. *See Miss. Power & Light*, 532 F.2d at 420 ("The advisability of invoking primary jurisdiction is greatest when the issue is already before the agency."). Finally, every party to this cause has, at one point or another, suggested that referral to the FCC under the

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[4] The Eighth Circuit briefly discussed a similar, but significantly broader, issue in *Iowa Utilities Board*. In that case, the issue was whether the FCC's unbundling rules could infringe on or result in an unconstitutional taking of the intellectual property rights of third parties who license their technology to incumbent LECs for use in the incumbent LECs' networks. *See Iowa Utilities Bd.*, 120 F.3d at 817-18. The Eighth Circuit expressed some skepticism about the merits of such a claim, observing that "the Act itself expressly contemplates that requesting carriers will have access to network elements that are proprietary in nature." *See id.* at 817 & n.37. However, the Eighth Circuit declined to reach the issue on the ground that no party to the proceeding had standing to pursue the claim. *See id.* at 817.

primary jurisdiction doctrine would at least be unopposed, if not appropriate. *See* SWBT's Motion to Dismiss at 11 ("If AT&T's contention is that the PUC or the FCC should have imposed [the requirements] AT&T advocates here, this Court should refer the questions to the proper agency under the doctrine of primary jurisdiction."); PUC Commissioners' Response at 2 ("[A]lthough the Commissioners are not unalterably opposed to a stay, the Court should be aware of certain considerations that counsel against a stay."). In sum, all of the factors heavily counsel in favor of referral to the FCC; therefore, the Court concludes that a stay is appropriate and that any ruling on summary judgment would be premature and ill-advised at this stage in the proceedings.

The same conclusion is compelled with respect to AT&T's interim number portability claim. With regard to that issue, the FCC rule promulgated under the Act provides as follows:

> **Deployment of transitional measures for number portability**
>
> All LECs shall provide transitional measures, which may consist of Remote Call Forwarding (RCF), Flexible Direct Inward Dialing (DID), or any other comparable and technically feasible method, as soon as reasonably possible upon receipt of a specific request from another telecommunications carrier, until such time as the LEC implements a long-term database method for number portability in that area.

47 C.F.R. § 52.27 (1997). It appears that the issue presented here—whether route indexing is a "comparable" and "technically feasible" method of interim number portability—is the precisely the type of unsettled, technical matter which is particularly within the FCC's specialized knowledge and expertise. Nevertheless, both SWBT and the Commissioners argue that summary judgment on this claim is preferable because the interconnection agreement requires SWBT to provide RCF and DID, the only methods of number portability which have been declared technically feasible under FCC regulations. *See In re Telephone Number Portability*, 11 FCC Rcd. 8352, 8409 ¶ 110 ("[B]ecause currently RCF and DID are the only methods technically feasible, we believe that use of these methods, in fact, comports with the requirements of the statute."). The FCC regulations go on to say,

however, that "the 1996 Act contemplates a dynamic, not static, definition of technically feasible number portability methods," and provides that incumbent LECs are required to begin deployment of a long-term number portability solution by October 1, 1997. *See id.* Although the defendants' arguments are not without some force, the Court is of the opinion that the proper course of action is to refer this matter to the FCC given (i) the open-ended and ever-changing obligation of incumbent LECs to provide number portability, and (ii) the explicit and unambiguous statutory mandate that the FCC implement the number portability requirement. *See* 47 U.S.C. § 251(b)(2).

For the foregoing reasons, the Court enters the following orders:

IT IS ORDERED that SWBT's Contingent Rule 12(b)(7) Motion to Abate or Dismiss [#7] is OVERRULED AND DENIED;

IT IS FURTHER ORDERED that SWBT's Motion to Dismiss Pursuant to Rule 12(b)(6) and 12(b)(1) [#11] is OVERRULED AND DENIED;

IT IS FURTHER ORDERED that AT&T's Motion for Stay and Referral to the Federal Communications Commission [#21] is GRANTED, and AT&T's claims for affirmative relief, originally filed in Cause No. A-97-CA-029-SS, are STAYED pending the exercise of primary jurisdiction by the FCC;

IT IS FURTHER ORDERED that the PUC Commissioners' Motion for Summary Judgment [#38] is OVERRULED AND DENIED without prejudice to refiling following the exercise of primary jurisdiction by the FCC;

IT IS FURTHER ORDERED that AT&T's Contingent Motion for Summary Judgment [#77] is DISMISSED AS MOOT without prejudice to refiling following the exercise of primary jurisdiction by the FCC; and

IT IS FINALLY ORDERED that SWBT's Contingent Motion for Summary Judgment [#89] is OVERRULED AND DENIED without prejudice to refiling following the exercise of primary jurisdiction by the FCC.

SIGNED on this 17th day of August 1998.

UNITED STATES DISTRICT JUDGE

CALIFORNIA PUBLIC UTILITIES COMMISSION
TELECOMMUNICATIONS DIVISION
FINAL STAFF REPORT

Pacific Bell (U 1001 C) and Pacific Bell Communications
Notice of Intent to File Section 271 Application
For InterLATA Authority in California

October 5, 1998

will not make a formal recommendation to the Commission on the method for combining UNEs. Instead, staff expect this issue to be addressed in the current pricing phase of the OANAD proceeding, and the Commission should have a draft decision for consideration by the end of the year. An issue of this importance and impact is best addressed in a generic proceeding where a substantial record has been developed. Staff will defer to the outcome in this generic proceeding, where the issue can be examined in a much broader context than was possible in the instant 271 proceeding.

However, if Pacific's five methods are approved in OANAD, in its 271 compliance filing, Pacific should provide a rigorous independent test that demonstrates how well each of the five methods performs. For more information, see the OSS Testing section.

b) Access to Intellectual Property

Intellectual property (IP) is the software programs which are part of a UNE which a CLEC leases. Pacific indicated that it is the CLEC's responsibility to obtain any necessary Right To Use (RTU) agreements, although during the course of the workshop Pacific did agree to negotiate with software vendors on behalf of a CLEC. Pacific also indicated that it would provide a list of licensees and use its best efforts to facilitate the obtaining of any licenses. Pacific stated that the company only intends to recover the costs of negotiating on CLECs' behalf, including any RTU specific to the CLEC's use of the UNE.

CLECs countered that Pacific should negotiate a master agreement with vendors on behalf of all CLECs using the intellectual property. When a CLEC orders a UNE that requires the use of intellectual property, Pacific is in the best position to know which rights are implicated.

The workshop participants discussed whether the software vendors are interested in having agreements with the CLECs. Pacific provided copies of documents filed at the FCC by Bellcore, Lucent Technologies, Northern Telecom, et. al. in April 1997 in CC Docket No. 96-98, in response to MCI's petition for declaratory ruling concerning provision in Southwestern Bell's Oklahoma and Kansas Statement of Generally Available Terms (SGAT). The SGAT provision made it clear that the CLEC, not the ILEC, was to negotiate agreements to use any intellectual property belonging to a party other than the ILEC which is embedded in an unbundled network element to be used by a CLEC. MCI asked the FCC to hold that TA 96 requires the ILEC to negotiate the CLEC's use agreement. The FCC has not yet acted on this issue.

Lucent made the following statement in its FCC filing on this issue:

> (T)he Commission must preserve Lucent's right to protect its intellectual property against use by any entity, whether a CLEC or incumbent LEC, in a

manner which exceeds the scope of the originally issued license grant, without due and just remuneration. This protection may include, but is not limited to, additional license terms, additional license fees and non-disclosure terms, as appropriate.

Lucent described cases where the scope of a license would have to be expanded. For example, its software licenses may contain provisions limiting the use of the software beyond a certain capacity (i.e., number of users or number of minutes). Another example Lucent raised involves its software development platforms licensed to customers for use in developing telecommunications applications. Use of the platform by a CLEC to develop its own applications would be outside the original license granted to the ILEC.

In its comments, Northern Telecom (Nortel) raised similar concerns, stating that if the UNE allows a carrier to access the vendor's equipment, software and/or proprietary information, or permits such carrier to modify the equipment or software, "significant vendor rights are likely to be implicated." Nortel also states that quality and performance specifications and indemnities made by Nortel to its customer may become void if the access provided to the requesting carrier results in the equipment or software being used in a manner not contemplated by the contract.

While Nortel's contracts may grant an ILEC or CLEC the right to make modifications to its software, Nortel states that it should not be liable for any claims that may be brought against the company arising out of such modifications. Either or both carriers should affirmatively indemnify Nortel against any claims brought by third parties against Nortel because of such modifications.

Even though the FCC has not yet acted on MCI's declaratory ruling, staff determined that the views expressed by the major switch vendors have merit, and will be taken into account. Software is a valuable commodity, and the rights of the developers of such intellectual property must be maintained.

At the time that a CLEC first orders a UNE involving the use of intellectual property, Pacific should give the CLEC two things: (1) a list of all software licenses associated with the UNE and (2) a description of the specific uses allowable under its own license agreement with the vendor.

Other issues to address include who should negotiate with the vendor, and who should pay the RTU fee. Decision 98-02-106 in the Commission's OANAD proceeding adopted Pacific's cost studies for UNEs, with some modifications which are discussed in the decision. The decision states as follows:

> Pacific's January 13 cost studies reflect the reassignment of approximately $500 million of "shared family" costs approved in D.96-08-021 directly to unbundled network elements, as required by TELRIC principles. Of this $500 million, Pacific determined that approximately $110 million should be assigned to

switching elements, such as call set-up, usage, line ports, trunk ports and vertical features. Approximately three-quarter's of the reassigned $110 million represents Right to Use (RTU) fees, i.e., license fees that Pacific pays for the use of switching software.

In other words, CLECs are already paying over $80 million in RTU fees which has been embedded in the cost of the switching UNE. While Pacific's position in the 271 proceeding is that the RTU for individual CLECs is not included in UNE prices,[15] that does not square with Pacific's cost study for the switching UNE. RTU fees have been included in the cost studies that Pacific filed with the Commission. Since Pacific is assessing this cost on CLECs, Pacific has the obligation to obtain any necessary RTU agreements on behalf of CLECs, at least for all instances in which the CLEC's usage of the intellectual property is the same as Pacific's. This must be done at no charge to the CLEC for either the negotiations or for the RTU fees themselves, since Pacific is already recovering those costs in the price of the UNE. However, in those cases where the CLEC seeks to use the software in a different manner, or to modify that software, the CLEC has an obligation to negotiate an RTU directly with the vendor and pay any RTU fees set by the vendor. Pacific should be indemnified and held harmless if the CLEC does not negotiate RTU agreements in those cases where it is using the software in a different manner from Pacific, or is modifying the software. Likewise, the software vendor should be indemnified and held harmless for any modifications to its software.

Staff recommends that Pacific perform the following steps relating to CLEC access to intellectual property in order to satisfy checklist requirements:

- At the time that a CLEC purchases a UNE involving access to intellectual property, Pacific should provide the following:
  - A list of the software vendors
  - A description of the specific license agreements for each type of software, i.e., specific uses, limits on number of users, or number of minutes.
- Pacific should negotiate any necessary RTU agreements for use of the software which parallels that in its own agreement with the vendor. Since Pacific is already recovering this element in its UNE prices, Pacific should not charge CLECs for negotiations or the RTU fees.

c) Access to Ancillary Equipment

In its March 31, 1998, filing AT&T stated that Pacific refuses to provide ancillary equipment (i.e., amplifiers, pads, equalizers, and signaling units) necessary for AT&T to be able to provide service through UNEs. Ancillary equipment is needed to interconnect UNEs or to make a UNE function properly. Without this equipment, many of the

[15] Pacific's comments on Staff Notes, Subject: UNEs: Access to Intellectual Property, July 23, 1998.

AT&T/MCI JOINT PROPOSAL – RIGHT TO USE ADDER
CHECKLIST ITEM 2, RECOMMENDATION 4

Legal Requirements

To the extent a right to use (RTU) adder is imposed, it must in provided in a way which ensures just, reasonable and nondiscriminatory access to UNES at parity with that SWBT itself obtains – Section 251(c)(3) of the federal act.

Competitive Requirements

Vendors, when approached by SWBT about additional RTUs, will have the natural incentive to seek to take advantage of the profit opportunity by demanding additional licenses. If the adder is negotiated by SWBT, but paid only by the CLECs, it is reasonable to expect that SWBT would have little incentive to test vendor claims that additional licenses are required or to ensure that fees are reasonable and on par with the fees charged SWBT. This expectation is reasonable in any circumstance where any entity, not just SWBT, is negotiating on behalf of its competitors and without any of its own self-interest at stake.

The outcome of such negotiations to be expected would likely be multiple and continuing proceedings in which the Commission is called upon to review individual RTUs obtained by SWBT to resolve disputes as to whether licenses were actually required and the extent to which the agreed fees were reasonable. This is precisely the situation that Commissioner Walsh sought to avoid in the May 21 Open Meeting:

> There may be stuff that's licensed to Southwestern Bell that other competitive providers or other ILECs have been using all along, and, you know, there may only be five things where, as a matter, you know, that you have to get a license, and what I want to do in the collaborative process is to pare the right-to-use issue down to the absolute bare minimum of legal licensing, and I want Southwestern Bell to participate in that, and to the extent that other people have been using this stuff in their system ad infinitum or for years or whatever, I don't want this to be thrown up as a barrier to entry, and I want to see it get down to the absolute bare minimum.
>
> I think we have to keep from having rights to use just sort of rise up now because people see an opportunity somehow to profit from this thing and get it down to the true . . . legal issue of violating somebody's licensing if you use it and don't get permission. (Docket No. 16251, May 21, 1998 Open Meeting Transcript, Pages 245-246)

The most efficient way to avoid or limit the unnecessary licenses and unreasonable fees is to ensure SWBT has the same incentives to limit incremental RTU fees that it has with respect to RTUs to this point. The events in the UNE cost proceeding, in which proposed costs in many instances were substantially above the level found by the Commission to be reasonable, is a good predictor of the course to be expected for RTU fees, absent the existence of such incentives.

In the existing environment where SWBT negotiates RTUs for its benefit and to benefit its customers, SWBT has the necessary self-interest to negotiate licenses only where necessary and to obtain the most reasonable fees, because it is compelled to pay the resulting costs.

Proposal

AT&T/MCI propose to extend this incentive to future RTUs by creation of single right to use adder which is calculated by application of all RTUs associated with the facility, existing fees plus any incremental fees subsequently negotiated by SWBT, across all uses of those facilities. All users of the facilities to which the right to use fees relate, CLECs and SWBT alike, would bear the right to use costs associated with the facility, with individual shares being determined by the individual company's actual use of the facility.